Article 24. Non-Parties

1. Transboundary movements of living modified organisms between Parties and non-Parties shall be consistent with the objective of this Protocol. The Parties may enter into bilateral, regional and multilateral agreements and arrangements with non-Parties regarding such transboundary movements.

2. The Parties shall encourage non-Parties to adhere to this Protocol and to contribute appropriate information to the Biosafety Clearing-House on living modified organisms released in, or moved into or out of, areas within their national jurisdictions.

599. Article 24 addresses the obligations of Parties in relation to the transboundary movement of LMOs to and from non-Parties to the Protocol. As noted in relation to Article 17, as an international treaty, the Protocol cannot create binding obligations for non-Parties – if a State chooses not to become a Party to the Protocol it will not be bound by the Protocol rules (see Box 32 and Box 43). Non-Parties to the Protocol may include States which are not Parties to the CBD.

600. However, Article 24 of the Protocol does govern the conduct of Parties in relation to the transboundary movement of LMOs between Parties and non-Parties. Article 24 requires such transboundary movements to be consistent with the Protocol’s objective but does not require that they be carried out in precise accordance with the Protocol’s detailed provisions, such as the AIA procedures.

601. It should be noted that States which are not Parties to the Protocol, but which are Parties to the CBD, will remain bound by relevant CBD requirements including those contained in Article 8(g) and Article 19(4) of the CBD. These are discussed in the Introduction.

602. The relationship between Parties and non-Parties is an important issue in international environmental agreements, especially those addressing trade in substances or products that are potentially harmful to the environment. In general terms, provisions on potential dealings between Parties and non-Parties to a treaty aim to:

- ensure that Parties to the treaty in question do not allow transboundary movements with non-Parties that would undermine the treaty, i.e. that omit protective measures prescribed by the treaty, or that adhere to environmental standards considerably lower than those of the treaty. If this were permissible, a Party could circumvent the treaty by simply sending potentially harmful substances to a country that is not a Party and does not adhere to the treaty’s standards, or by receiving potentially hazardous materials from such a country;
- encourage non-Parties to join the treaty. Restricting trade between Parties and non-Parties provides an incentive for countries to join the treaty, discourages the development of a dual standard of environmental protection, and prevents non-Parties from developing a competitive trade advantage by remaining outside the treaty regime.

These two aims are reflected in Article 24 of the Protocol: Article 24(1) addresses the first aim, and Article 24(2) the second. As illustrated in Box 42, these aims have been addressed in different ways in different multilateral environmental agreements.
The question whether or not the Protocol should permit transboundary movement of LMOs from or to non-Parties, and if so, to what extent its provisions should apply to such transboundary movements, was one of the more contentious issues in the Protocol negotiations. A proposal to prohibit transboundary movement of LMOs to or from non-Parties altogether met with considerable opposition and was eventually dropped. Some countries raised the concern that a prohibition on transboundary movements of LMOs between Parties and non-Parties could be challenged as an import or export ban under the WTO. The question as to whether transboundary movement from or to non-Parties should be consistent with the “objective” or with the “provisions” of the Protocol was also extensively discussed.

The resulting text of Article 24 allows Parties to engage in transboundary movements of LMOs, but only under certain conditions.

**1. Transboundary movements of living modified organisms between Parties and non-Parties shall be consistent with the objective of this Protocol.** The Parties may enter into bilateral, regional and multilateral agreements and arrangements with non-Parties regarding such transboundary movements.

This provision addresses the aim of ensuring that Parties adhere to a standard of protection consistent with the Protocol in relation to their dealings with non-Parties. It requires that transboundary movement of LMOs between Parties and non-Parties must be “consistent with the objective of this Protocol”.

Since the Protocol cannot create obligations for non-Parties, Article 24(1) makes it the

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**Box 42. Approaches to transboundary movements between Parties and non-Parties in selected multilateral environmental agreements**

As this indicates, some multilateral environmental agreements addressing trade in potentially harmful substances allow Parties to trade with non-Parties only if a minimum standard of protection is applied. This can be achieved by:

- prohibiting trade with non-Parties unless it is undertaken in accordance with a separate agreement establishing, as a minimum, environmental standards that are equivalent to those set by the treaty (e.g. Basel Convention);
- by providing that trade may only be carried out with non-Parties that use standards equivalent to those established by the treaty (e.g. Montreal Protocol); or
- permitting transboundary movements with non-Parties and stating the conditions that must be met by such transboundary movements (e.g. CITES).

<table>
<thead>
<tr>
<th>MEA (Issue)</th>
<th>Transactions with non-Parties</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basel Convention (hazardous wastes)</td>
<td>Prohibited in principle, permissible under specified conditions</td>
<td>Agreement with the non-Party, establishing standards equivalent to those of the Basel Convention.</td>
</tr>
<tr>
<td>Article 4(5), Article 11</td>
<td>Prohibited in principle, permissible under specified conditions</td>
<td>Meeting of Parties determines that the non-Party is in compliance with the requirements of the Montreal Protocol.</td>
</tr>
<tr>
<td>Montreal Protocol (ozone-depleting substances)</td>
<td>Permissible</td>
<td>Comparable documentation may be accepted instead of documentation required by CITES.</td>
</tr>
<tr>
<td>Article 4</td>
<td>Permissible</td>
<td>Transboundary movement must be consistent with the objective of the Protocol. Separate agreement with non-Party possible but not required.</td>
</tr>
<tr>
<td>CITES (endangered species of plants /animals)</td>
<td>Permissible</td>
<td></td>
</tr>
<tr>
<td>Article 10</td>
<td>Not addressed</td>
<td></td>
</tr>
<tr>
<td>Cartagena Protocol (LMOs)</td>
<td>Permissible</td>
<td></td>
</tr>
<tr>
<td>Article 24</td>
<td>Not addressed</td>
<td></td>
</tr>
<tr>
<td>Rotterdam Convention (potentially hazardous chemicals)</td>
<td>Not addressed</td>
<td></td>
</tr>
</tbody>
</table>
responsibility of any Party conducting transboundary movements with a non-Party to ensure consistency with the objective of the Protocol. In order to be consistent with the Protocol’s objective, an Article 24 arrangement or agreement would need to be in accordance with the precautionary approach contained in Principle 15 of the Rio Declaration, and contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of LMOs that may have adverse effects on biological diversity, taking also into account risks to human health. While the agreement or arrangement would not need to replicate the same procedures and techniques, such as the AIA provisions, contained in the Protocol it should provide for equivalent measures necessary to achieve an adequate level of protection. Thus, as a minimum, it should provide for a mechanism to ensure safe transfer, handling and use of LMOs, and for a method to provide the importing country with an opportunity and a basis for deciding whether or not to consent to the import of LMOs. (See also commentary on Article 9, paragraphs 302 and 303).

607. Parties may conclude separate agreements with non-Parties to govern transboundary movements of LMOs, but they are not obliged to do so. If such an agreement is concluded, its relationship with the Protocol will be governed by the applicable rules of international law as codified in the Vienna Convention on the Law of Treaties (see commentary on Article 14).

608. As noted in relation to Article 14, one question which arises in relation to Article 14 is whether the “additional” standard set in that Article for bilateral, regional and multilateral agreements and arrangements also applies to such agreements and arrangements between Parties and non-Parties under Article 24(1). Article 24(1) requires that transboundary movements of LMOs between Parties and non-Parties are “consistent with the objective of this Protocol”. Article 14(1) requires that such agreements and arrangements must be “consistent with the objective of this Protocol” and also must “not result in a lower level of protection than that provided for by the Protocol. Two possible interpretations have been put forward:

- Article 14 addresses agreements and arrangements between Parties only; Article 24 addresses agreements and arrangements between Parties and non-Parties. This interpretation is supported partly by the negotiation history of the two provisions: i.e. by the fact that separate provisions are included in Article 24 addressing non-Parties, and that there is no explicit cross-reference in Article 24 to Article 14. It is also supported by the reference to “transboundary movement” in Article 14, taken together with the definition of that term in Article 3(k) which limits it to movements of LMOs between Parties except in relation to Articles 17 and 24. A narrow reading of Article 3(k) and Article 14 would imply that “transboundary movement” in Article 14 can only take place as between Parties.

- Article 14 addresses separate agreements and arrangements in general terms; Article 24 specifies that such agreements and arrangements may also be concluded with non-Parties. This interpretation is based on the following argument: Article 14 provides that Parties may enter into bilateral, regional and multilateral agreements and arrangements, but does not specify with whom such agreements or arrangements may be concluded. It could therefore reasonably be interpreted as referring to such agreements and arrangements in general terms, while Article 24, which also refers to “bilateral, regional and multilateral agreements and arrangements” specifically addresses dealings with non-Parties. In that case the requirements of Article 14 would also apply to agreements and arrangements entered into by Parties under Article 24.

609. Thus, there are arguments to support each interpretation, although the text of the Protocol would appear more strongly to support the first. In practice, however, the distinction may not be of major significance. As an international treaty, the Protocol is, of course, not binding upon non-Parties without their consent. However, one or more of the parties to the bilateral, regional or multilateral agreement or arrangement will be a Party to the Protocol. As such, it will remain bound by its obligations under the Protocol. These include, for example:

- the obligation to act in a manner consistent with the objective of the Protocol (Article 1; Article 24(1));
- the obligation to ensure that activities involving LMOs are undertaken in a manner that prevents or reduces the risks to
biological diversity, taking also into account risks to human health (Article 2(2));

- the obligation to establish and maintain appropriate mechanisms, measures and strategies to regulate, manage and control risks identified in the risk assessment provisions of the Protocol associated with the use, handling and transboundary movement of LMOs (Article 16(1)).

610. As Parties to the Protocol will also be in every case Parties to the CBD, relevant obligations will also include those contained in Article 8(g) and Article 19(4) CBD. States which are not Parties to the Protocol, but which are Parties to the CBD will also remain bound by Article 8(g) and Article 19(4) CBD (see Introduction). In accordance with Article 2(4), and subject to agreement with the non-Party concerned, agreements and arrangements entered into under Article 24(1) could also establish a higher level of protection than that provided for by the Protocol.

611. Where a Party enters into such agreements and arrangements with non-Parties, it must provide information on those agreements and arrangements to the Biosafety Clearing-House under Article 20(3).

612. The application of Article 24 in practice may differ according to whether the Party to the Protocol is the Party of import or the Party of export of the LMO. The following considerations, for example, may be relevant:

- If the Party is the importing State, it may require the non-Party exporting State to comply with the AIA procedure of the Protocol, as implemented in its national regulations (or with its own consistent domestic regulatory framework). Alternatively, it may accept another form of prior notification, which must however ensure that the importing Party has a firm basis for undertaking risk assessment prior to the intended movement. In any event, the importing Party may not consent to the movement unless the exporting non-Party State agrees to use a procedure that fulfills the requirement of consistency with the objective of the Protocol. In deciding whether to allow the proposed import, the Party should undertake a risk assessment based on Article 15 and Annex III in order to assess potential impacts on biodiversity, taking also into account risks to human health, and to identify appropriate risk management measures.

- If the Party is the exporting State intending to transfer LMOs to a non-Party, it must notify the importing State either in accordance with Article 8, or in a manner that is otherwise consistent with the objective of the Protocol. One issue that may arise here is whether a Party of export can proceed with an export to a non-Party State if that State has no regulatory framework or other risk assessment and risk management framework in place. In this case, the Party of export would need to consider whether the export would be consistent with the objective of the Protocol and with its own other relevant obligations under the Protocol. However, it is not required, of course, that the measures in place in a non-Party State of import be the same as those required under the Protocol.

- As transit of LMOs is exempt from the AIA procedure in accordance with Article 6(1), the State of transit, whether or not it is a Party, does not have to be notified of, or to consent to, a transboundary movement of LMOs, unless its relevant domestic regulations so require.

In practice, for reasons of regulatory efficiency, one might expect Parties to the Protocol to deal with imports from and exports to Parties and non-Parties within the same regulatory framework.
2. The Parties shall encourage non-Parties to adhere to this Protocol and to contribute appropriate information to the Biosafety Clearing-House on living modified organisms released in, or moved into or out of, areas within their national jurisdictions.

613. Parties must “encourage” non-Parties to adhere to the Protocol, i.e. to apply its principles or to become Parties. The way in which they do this is left open. It may include active encouragement, for example by pointing out the advantages of Party status or by providing technical, financial or institutional support for adherence to the Protocol.

614. Article 24(2) also encourages States that are not Parties to provide information to the Biosafety Clearing-House on transactions related to LMOs in which they have been involved. The aim is to gather as much relevant information as possible and make it available to all Parties, in accordance with the general function of the Biosafety Clearing-House (see commentary on Article 20).

<p>| Box 43. Responsibilities of the States involved in transboundary movement between Party and non-Party |</p>
<table>
<thead>
<tr>
<th>State of export (SE)</th>
<th>State of import (SI)</th>
<th>Responsibilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party</td>
<td>Non-Party</td>
<td>SE must notify SI, using AIA or similar procedure. If SI agrees to movement, SE must ensure that this is carried out in a way consistent with the objective of the Protocol.</td>
</tr>
<tr>
<td>Non-Party</td>
<td>Party</td>
<td>SI may require SE to use AIA. It can also accept a procedure consistent with the objective of the Protocol, but may not consent to the movement without such a procedure.</td>
</tr>
</tbody>
</table>